IN CIRCUIT COURT OF ROANOKE COUNTY, VIRGINIA.

January 23rd, 1907.

TIDEWATER R. R. Co., plaintiff, *v.* SHARTZER, *et als.*, defendants.

Eminent Domain—Construction of Virginia Constitution.—The phrase "or damaged" in the Virginia constitution, which prohibits the legislature from enacting any law whereby private property is taken or damaged for public uses without just compensation, entitles the property owner to a recovery either where the damage inflicted is of a character that would give rise to an action at common law, or where there has been some direct physical disturbance of a right either public or private which the plaintiff enjoys in connection with his property, and which gives it additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally, even though the act done is of a character that no action at common law can be maintained therefor.

Same—Same.—In order for the landowner to recover, the character of the injury complained of must be of such a nature as would have given him the right to recover at common law but for the legislative sanction. That right must be based on nuisance and not trespass, for nuisance is distinguishable from trespass, since it consists in use of one's own property in such a manner as to cause injury to the property of others.

Same—Same.—The word "damaged" in this constitutional provision covers any loss or injury which may properly be taken into consideration in estimating damages to the balance of the tract where part is taken.

Same—Same.—The phrase "or damaged" as used in the constitutional provision which prohibits the legislature from enacting any law whereby private property is taken or damaged for public uses without just compensation, does not embrace depreciation caused by the construction and operation of works of public use, such as the building of a market, a jail, or any other undesirable public building near by, no matter how occasioned.

Same—Same.—Under the Virginia constitution any damages may be recovered that may arise from the operation, as well as the construction, of a railroad. Distinguishing Pennsylvania R. Co. *v.* Marchant (Penn.), 13 Atl. 690; Austin *v.* Augusta Terminal R. Co. (Ga.), 47 L. R. A. 766.

Same—Same—Nuisances.—Under the Virginia Constitution, which prohibits the legislature from enacting any law whereby private property is taken or damaged for public use without just compensation, it is not necessary to a recovery for injuries sustained from the operation of an unchartered railroad, that it be declared a nuisance per se.

Same—Same—Same.—A railroad chartered or unchartered is not a nuisance per se, for to be such it must be a nuisance under all circumstances and conditions.

Same—Same—Same—Legalizing Nuisances.—The legislature may legalize that which but for such sanction would be unlawful and a nuisance. Fisher *v.* Seaboard Air Line, 102 Va. 369.

Same—Same—Same—Smoke—Noise and Vibration.—Where the smoke, noise, cinders, ashes, dust and vibration from a chartered railroad company materially, annoy and disturb one in possession of his property, rendering its use or occupation physically uncomfortable to him, such damage may be recovered under the Virginia constitution which prohibits the legislature from enacting any law whereby private property is taken or damaged for public uses without just compensation, for the reason that if these acts were committed by an unchartered railroad company they would amount to an actionable nuisance.

Robertson, Hall and *Woods*, for plaintiff.
A. A. Phlegar and *Mr. McClung*, for defendants.

Opinion by JUDGE HENSON.

I am called upon to construe our constitutional provision, which prohibits the Legislature from enacting any law whereby private property is taken or damaged, for public uses without just compensation, and more particularly to construe the phrase "or damaged" which has been engrafted into our organic law by the recent Constitutional Convention.

We know the evils that this provision was intended to remedy. Prior to the adoption of this provision, no matter how great the consequential injury, where there was no actual taking, if the public works had legislative sanction and were constructed in a proper way and operated in a careful manner, there could be no recovery, and no matter in what manner the owner attempted to get redress for his loss, he was always defeated by the defense of "damnum absque injuria," the law being tersely expressed in the case of Fisher *v.* Seaboard Air Line, 102 Va. 369: "That no action can be maintained for loss or inconvenience which is the necessary consequence of an authorized thing being done in an authorized manner;" and as our country grew in people and prosperity, railroads began to multiply, cities with their numerous public necessities sprang up, with constantly increasing demands for public service corporations, such as railroads, street cars, light and water supply, that the natural consequence was that corporations endowed with the power of eminent domain multiplied, and many, many cases of hardship arose of absolute individual loss for public good. Now our fairminded people realized that it was unfair and unjust that some of our citizens

should be specially damaged for public improvements and all share equally the benefits. It has been well said that "it is not the policy of the fundamental law of our land that the general public should enjoy any advantage or benefit whatever at the expense of a private citizen." This being the condition of affairs, the state of Illinois in 1870 lead off with the constitutional provision "That private property shall not be taken or damaged for public uses without just compensation," and since that time eighteen other states have placed in their organic law practically the same provision. So just is such a provision that, so far as I know, there has not been a single constitutional revision since 1870 by any state where this provision has not been adopted, while on the other hand, the Supreme Courts of several of the states which have not this provision, by an elastic and liberal construction of the word "taken" have attained the same end, and rendered a constitutional provision unnecessary.

Counsel both for plaintiff and defendant invoke the well-settled rule of law, "That where one state takes a statute or a constitutional provision from another state, and prior to the enactment or adoption thereof, that such statute or constitutional provision had been construed by the highest judicial tribunal of such state, that such construction is also adopted."

And this was the argument made by Mr. Wescott in the constitutional convention. Mr. Wescott seemed to be the special champion of this provision. He said: "If we adopt the provision which the majority of the committee will ask you to adopt, then we have an unbroken line of construction of no less than seventeen states of the Union on that question. Lead by the great state of Illinois, several of whose cases have gone to the Supreme Court of the United States; that is not all. There is no maze of difficulty in which we involve either the state or the jurisprudence of the state." Debates Constitutional Convention, vol. 1, p. 704. An investigation of the decisions of the several states, which have this constitutional provision, has convinced me that Mr. Wescott was a little hasty in the conclusion arrived at. So far from the states being in harmony on this question, Mr. Lewis, in his excellent work on Eminent Domain, vol. 1, § 235b, lays down four different views which have been adopted by the courts of the different states, which have this constitutional provision. He says, "In endeavoring to give a general interpretation to the words 'damaged or injured' as used in recent constitutions, courts have usually adopted one or the other of the following views:

"1st. That the words embraced only what are known as actionable damages; that is, such damages as would form this basis of an action at common law, but for the statutory authority.

"2nd. That they embrace only damages caused by some phys-

ical injury to the property or by an interference with some private right appurtenant to the property or of some public right, which the owner is entitled to make use of in connection with his property.

"3rd. That they cover any loss or injury which may properly be taken into consideration in estimating damages to the balance of a tract when part is taken.

"4th. That they embrace any depreciation caused by the construction and operation of works for public use no matter how occasioned."

These conflicting views of the courts of last resort in the states which have adopted this provision make it impossible to apply the rule above stated, viz.; that when our state adopted the provision in question, that we at same time adopted the judicial construction which had been placed on this constitutional clause by the courts of other states.

So we must then adopt that line of decision which seems best supported by reason and weight of authority and especially is this so if we can find from the proceedings of the late constitutional convention that such was the intent and idea of the makers of our constitution.

All admit that there may be a recovery for such damages as would have formed the basis of an action at common law, but for the legislative sanction. This is admitted by the courts of all the states, and by counsel for both sides in case at bar. This is the first proposition; shall we limit the recovery to this? This brings us to the second proposition stated by Mr. Lewis. I can see very little difference between the first of the propositions stated by Mr. Lewis and the second one. It seems to me that the injury set out in the second proposition would be basis for an action for damages at common law. In the leading case of Rigney *v.* City of Chicago, 102 Ill. 80, 81, the court says: "In all cases to warrant a recovery it must appear that there has been some direct physical disturbance of a right either public or private, which the plaintiff enjoys in connection with his property and which gives it additional value, and by reason of such disturbance he has sustained special damage with respect to his property in excess of that sustained by the public generally. In the absence of any constitutional or statutory provision, the common law afforded redress in all such cases, and we have no doubt but it was the intention of the framers of our constitution to require compensation to be made in all cases where but for some legislative enactment an action would lie by the common law." The case of Austin *v.* Augusta Terminal R. Co., 47 L. R. A. 755, contends for same proposition, viz; that "the acts done must be actionable at common law, but for legislative sanction, at same time contending, that in order to be so, that there must be a direct

physical disturbance of a right either public or private, which the plaintiff enjoys, etc."

The Illinois cases have uniformly followed the statement of law made in the Rigney case, except, however, in the Scott case, 132 Ill. 429, seemed to go a little farther, and states that the appellant's proposition that, "The corporation is not liable unless an individual doing the same thing on his private property would be, as applied to this case, is not sound," but the recovery in that case could easily have been placed on the ground of nuisance. I do not think the cases of Chicago & W. R. Co. *v.* Ayers, 106 Ill. ——, intended to go farther than the Rigney case, although the language is broader. After referring to the Rigney case as conclusive of the case, the court says: "The conclusion there reached was that under this constitutional provision a recovery may be had in all causes where private property has sustained a substantial damage by making and using an improvement public in its character, that it does not require that the damage shall be caused by trespass on an actual physical invasion of the owners' real estate, but if the construction and operation of the railroad or other improvement is the cause of the damage," though consequential, the party may recover. The United States Supreme Court in Chicago R. Co. *v.* Taylor, 125 U. S. 170, quotes from the opinion of the state court in the Rigney and Ayers cases, and approves the construction therein given. Then we must conclude that the word damage as used in the Ayers case refers to that class of damages that under the law as laid down in the Rigney case are recoverable, viz; where an action at common law would lie out for the legislative sanction, or when there was some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property and which gives it additional value and that by reason of such disturbance he has sustained special damage with respect to his property in excess of that sustained by the public generally. That there has been no intention to enlarge the grounds for recovery stated in the Rigney case, the exact doctrine set forth in the Rigney case is quoted and set out as the law of Illinois in case of Aldrich *v.* Metropolitan R. Co., 63 N. E. Rep. 156, and the doctrine of the Rigney case, Ayers' case, Illinois and Taylor case, supra, have been approved by the Supreme Court of this state in Swift & Co. *v.* Newport News, 52 S. E. 824. I am not prepared to say that a case cannot arise, where the second line of decisions cited by Mr. Lewis are not included in the first. I feel satisfied, however, that any case either where the damage inflicted is of the character that would give rise to an action at common law, or where there has been some direct physical disturbance of a right either public or private which the plaintiff enjoys in connection

with his property, and which gives it additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally, even though the act done is of a character (if such a thing can be) that no action at common law could be maintained therefor, that the framers of our constitution intended that the property owner should be paid therefor. Now the question is, Did they intend to go any further? and this brings us to the consideration of the third and fourth lines of decisions mentioned by Mr. Lewis.

The third, That the word damage covers any loss or injury which may properly be taken into consideration in estimating the damages to the balance of the tract where part is taken.

I have not had access to any of the decisions which treat of the question just from this standpoint, and this view does not seem to be discussed by the framers of the constitution. I will discuss this view when I discuss the legislative provision in regard to eminent domain, and at same time discuss the case of Swift & Co. *v.* City of Newport News (Va.), 52 S. E. 821, which seems to support this view to a limited extent.

Now as to the fourth line of decisions cited by Mr. Lewis. If this line of decisions is followed, the effect will be, not only to protect the citizen from an act of the Legislature, which would deprive him of a common-law right to recover damages, but would create for him a new right to recover damages where otherwise he had none. It would create for him a weapon both of offense and defense. It would allow a whole community to recover for the building a market, a jail, or any other undesirable public building nearby. Of all the states which have adopted this constitutional provision, only the states of California, Nebraska, Montana and possibly South Dakota hold to this view. An examination of the debates of the constitutional convention shows that the opponents of this measure to a large extent based their opposition on the grounds that they feared the interpretation given by these western courts would be given by the courts of this state, while the advocates of the measure insisted there was no danger; that our courts would follow the Illinois courts, with the pioneer case of Rigney *v.* Chicago R. Co., supra, and the case of Taylor *v.* Railway Co., 125 U. S., supra. So we must at least conclude that the intention of the framers of our constitution who voted for this measure, was that it should not receive the construction given it by the western courts. For an interesting article giving in detail how each of the states have construed this provision, see an article in 8th Va. LAW REGISTER, page 525. I have not had access to the decisions of all the states, but so far as I have, I have found the author in the main correct.

I will not test the right of the landowner to recover in this case by the first two lines of decision laid down by Mr. Lewis, or rather by the first, for the character of the injury complained of is of that nature. That the right to recover if at all must be such as would have given the landowner the right to recover at common law but for the legislative sanction. That right must be based on nuisance and not trespass, for nuisance is distinguishable from trespass, since it consists in use of one' own property in such a manner as to cause injury to the property of others. Norcross *v.* Thomas, 51 Maine 503, 81 Am. Dec. 588. It is vigorously insisted by counsel for applicant that it must not only be a nuisance, but must be a nuisance per se, and a railroad even if operated by a private person is not a nuisance per se, and cites to support his proposition Beseman *v.* Pennsylvania R. Co., 13 Atlantic Reporter 164, and Austin *v.* Terminal R. Co. (Ga.), 47 L. R. A. 755. In the first styled cause, the defendant was a chartered railroad with legislative sanction to build and operate its railroad. The plaintiff contended that as to private property that a railroad was a nuisance per se, that the Legislature could not authorize a nuisance per se, to exist and injure private property without giving the owner redress. The court said: "No, the operation of a railroad is not a nuisance per se, and having legislative sanction; it is not liable for incidental and consequential damages inflicted by its due and orderly operation." It did not undertake to decide that it might not under some circumstances, but for legislative sanction, become a nuisance in fact. In fact, it refers approvingly as to the conclusion of an English case cited in argument; where it was held, "That the burning of a haystack by the engine of an unchartered company was a loss that could be redressed by action, without respect to the questions whether the fire had been kept with proper care or not," and yet the court declared as has been judicially declared in this state, that if the engine had been used under legislative authority such loss would have been remediless. This is a strong case for the doctrine that while a chartered railroad is not a nuisance per se, it may be a nuisance in fact if unchartered. In the Georgia case it was said that an unchartered railroad should be held to be a nuisance per se, before there could be a recovery under the constitutional provision in question, and after citing some text writers who seem to hold that an unchartered railroad is a nuisance per se, says the cases cited, do not support the text, and then proceeds to discuss the matter, and winds up by saying: "That he has found no case holding that a railroad on private property is a nuisance per se; on the contrary, that a number of cases expressly hold that a railroad is not a nuisance per se; railroads in cities and towns cannot be termed nuisances," citing

cases from English and American courts, ALL of which refer to chartered railroads.

A nuisance per se is defined in Windal Manufacturing Co. *v.* Patterson, 62 Am. St. Rep. 532: "Is that which is a nuisance in itself and which therefore cannot be so conducted or maintained as to be lawfully carried on or permitted to exist; such nuisance is a disorderly house, or an obstruction to a highway, or navigable stream."

So that I fully agree with the courts of New Jersey and Georgia that a railroad chartered or unchartered is not a nuisance per se for to be such it must be a nuisance under all circumstances and conditions, for I do not suppose any one would contend that a private railroad to haul logs constructed and operated in a wilderness would be a nuisance. Is it necessary that in order to recover that a railroad unchartered should be declared a nuisance per se? Let us reduce the contention of the counsel for the railroad to a syllogism.

The plaintiff is entitled to damages in all cases where he would have had cause of action against an individual or a private corporation, but for legislative sanction.

He has no cause of action against an unchartered railroad company unless under the law it is a nuisance per se.

Therefore he has no cause of action against an individual or private corporation unless the acts complained of are nuisances per se.

We know the major premise is correct. We know the conclusion is wrong. We easily see the trouble with the conclusion is the error in the minor premises.

Is it not more logical to say the plaintiff is entitled to damages, when he would have had cause of action against an individual or a private corporation but for the legislative sanction.

That he has such cause of action whenever the operation of the business of the individual or private corporation is such as creates a nuisance. Therefore he can recover damages from a public corporation when the operation of its business creates a nuisance.

But it is argued that if the operation of a railroad company is a nuisance you could not legalize it, that it could be stopped by injunction and as we cannot stop by injunction a duly authorized railroad, then of course it is not a nuisance.

The question is not whether a chartered railroad is a nuisance, for we know it is not. A nuisance is unlawful, and that which the law authorizes is not unlawful, but rather whether an unchartered railroad, although run in a proper manner, as to certain properties and certain conditions, may be a nuisance.

A convenient authority for the proposition that the Legislature may legalize that which but for such sanction would be

unlawful and a nuisance, may be found in the recent case of Fischer *v.* Seaboard Air Line, 102 Va. 369, wherein the Court of Appeals of this state quotes approvingly from Transportation Co. *v.* Chicago, 99 U. S. 635. That court said: "That cannot be a nuisance such as to give a common-law right of action which the law authorizes. We refer to an action at common law, such as this is. A Legislature may, and often does, authorize and even direct acts to be done which are harmful to individuals, and which without the authority would be nuisances, but in such a case if the statute be such as the Legislature has power to pass the acts are lawful and not nuisances, unless the power has been exceeded. In such grants of power a right to compensation for consequential injuries caused by the authorized erections, may be given to those who suffer, but then the right is the creature of statute. It has no existence without it. If this were not so the suffering party would be entitled to repeated actions until an abatement of the erections would be enforced, or perhaps he might restrain them by injunction."

I admit that there is a strong array of authority for the proposition, that legislative sanction cannot authorize a private nuisance, at least without requiring just compensation, and the great Fifth Baptist Church case leans decidedly in that direction, but in that respect it seems to be in conflict with the case above cited of Transportation Co. *v.* Chicago, 99 U. S. 635. The whole subject of power of the Legislature to authorize a private nuisance is discussed, and many English and American cases cited in a note to Louisville & Nashville Terminal Co. *v.* Lellyet, Trustee, 1 L. R. A., new series, page 49, in which the annotator takes the ground that in so far as the Legislature undertakes to authorize a public service corporation without compensation, to commit that, which, but for such sanction, would be a private nuisance, is unconstitutional and void, and no protection against suits on account thereof. Quoting from a Texas court on pages 114-15, says: "It has been said that the taking of property from one person and giving it to another, would not be legislation but robbery; equally is it robbery to permit the destruction of one man's property by the maintenance of a nuisance on adjoining property for the sole benefit of the owner;" the ground of the unconstitutionality being the violation of the constitutional provision against "taking" without just compensation; and distinguishes some of the American cases from the English cases, on this subject, by calling attention to the fact that England has no constitution and Parliament is supreme. If this doctrine was the law of this state it would in no way relieve applicant of liability, but our courts do not give the word "taken" such a liberal construction, and the case of Fisher *v.* Seaboard Air Line settles the law in this state.

This, then, brings us to the main question. Would under any circumstances or conditions the smoke, cinder, noise, etc., arising from the usual and ordinary operation of a railroad, amount to a nuisance at common law? For the answer we must look to the definition of nuisance, and examine the adjudged cases in relation thereto. The definition of nuisance, which is possibly entitled to greater weight than any other in this country, is the definition given by that august tribunal, the Supreme Court of the United States, in the celebrated case of Baltimore & Potomac R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 27 L. Ed. 739. The venerable Justice Field, speaking for the court, said:

"That is a nuisance which annoys and disturbs one in the possession of its property rendering its ordinary occupation physically uncomfortable to him."

A similar definition was given by Lord Romelly, M. R., in Crump *v.* Lambert, L. R., 3 Eq. 409, where he said:

"The real question in all cases is the question of fact, viz; whether the annoyance is such as to materially interfere with the ordinary comfort of human existence."

Both courts were dealing with nuisances, arising from smoke, noise, etc.

The modern rule as to nuisance, so far as same is caused by trades, manufacturers, etc., is well laid down by Mr. Bishop in his non-contract law, § 418. He says:

"Two things essential to general prosperity and happiness are useful trades, whereby people are supplied with things necessary in life, and healthful and peaceful dwellings, and structures for habitation, and trade cannot well be remote from each other. Here are two interests traveling to one ultimate goal, yet in constant conflict during the journey, and courts in administering justice between them necessarily require each to lay aside something of what pertains to mere convenience and comfort. Yet they permit each other to stand, so far on its own rights as not to be destroyed. The question does not admit of a great deal of technical rule; it is rather practical and moulded in its forms by the exigencies of the particular case. As to the dwelling, the real question in all cases is said to be one of fact, namely; whether the annoyance is such as to materially interfere with the ordinary comfort of human existence; trifling inconveniences are not regarded. But, however useful and lawful the business, if as carried on it gives the neighboring residents annoyance, materially interfering with the ordinary physical comforts of life, it will be adjudged a nuisance." These remarks of Dr. Bishop in regard to dwelling houses and useful trades, etc., apply with equal force to dwelling houses and railroads. For instance, of smoke, noise, etc., being declared nuisances, see Am. & Eng. Ency. of Law, 2d Ed., vol. 21, pp. 692-693. Also collected to

some extent and set out fully in the dissenting opinion of Austin *v.* Augusta Terminal R. Co., 47 L. R. A. commencing page 766. The case of B. & P. R. Co. *v.* Fifth Baptist Church, owing to its high authority, is probably the leading case and has been followed in case in which the facts were very much similar. Townsend *v.* Norfolk Ry. & Light Co., 52 S. E. 970. A typical case of noise, dust and cinders being declared a nuisance is found in 81 Am. Dec. 588, a case from Maine, where a blacksmith shop, close to a hotel was declared a nuisance. Before taking up the cases which hold that smoke, dust, noise, cinders, etc., arising from the ordinary operations of a railroad company, may constitute such damages as are recoverable under the constitutional provision under consideration, I will take up the two cases so strongly relied on by the railroad company, which hold the contrary view. I refer to the cases of Pennsylvania R. Co. *v.* Marchant, 13 Atl. Rep. 690, and Austin *v.* Augusta Terminal R. Co., before mentioned.

There is a vast difference in the Pennsylvania constitutional provision on this subject and ours. The Pennsylvania constitution says: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed in the *construction or enlargement* of their works; compensation shall be paid or secured before such taking, injury or destruction."

This Pennsylvania case holds, construing this provision of this constitution, that by the use of the words construction or enlargement, and also requiring the damage to be first paid or secured, that this provision only referred to damages occasioned by the work of *construction or enlargement* and had no reference to damages caused by its operation. And the court was doubtless right in this construction. I understand the act of Parliament on this subject is similar to the Pennsylvania constitution, and that for that reason the English courts hold as the Pennsylvania court did. An extract from the leading English case of Hammersmith R. Co. *v.* Brand is found in case of Gainesville R. Co. *v.* Hall, Texas, 22 Am. St. Rep. 46, where the court says: "We deem it proper before leaving this subject to comment briefly upon the case of Hammersmith R. Co. *v.* Brand referred to, upon which the appellant seems mainly to rely for a reversal of the judgment. In its decision a great amount of labor and a great wealth of learning was expended. The plaintiff's claim in that case was precisely like the claim in this. The court of the Queen's Bench held that the plaintiff was not entitled to recover. This judgment was reversed in the Exchequer Chamber, but on final appeal to the House of Lords, was sustained. Four of the five judges who were cited to advise the lords were

of the opinion that the plaintiff was entitled to recover and in that opinion one of the law lords concurred. Two of the law lords held a contrary opinion and the House gave judgment accordingly. The important fact however that the decision of the case turned upon the construction of the acts of Parliament which allowed compensation to owners "when lands were taken or injuriously affected" by the construction of public works, the question was whether compensation was intended to be allowed only for damages occurring from the construction of the works or whether it included also such damages as resulted from the operation of the trains after the works had been constructed. The damages in the case were clearly of the latter character, and each of the judges who gave an opinion against the right of compensation, placed it distinctly upon the ground that the act of Parliament gave compensation only for such damages as resulted from the construction of the road and not from the operation of its trains. All of the judges concede that plaintiff's property had been "injuriously affected" and if the language of the statute had been broad enough to embrace damages resulting from the operation of the works the plaintiff would have been entitled to recover." So that this case though oft quoted in opposition to the right of recovery, when rightly understood, favors a recovery where the language is, "injuriously affected" or its equivalent, "damaged," and not limited by the word construction. A complete answer to the judgment in the Pennsylvania and English cases is, that our constitutional provision is not limited by the word construction, or any words of similar import; neither does it require the damages to be first paid. After the Pennsylvania court decided that by its constitution the damages were limited by the word "construction" then the rest of the case was dicta. The court, however, went on, and asked the question, Were a natural person operating this road in the manner the defendant company were doing, would he be responsible to the plaintiff in damages, and then said, "We answer in the negative." The law of nuisance is very little discussed. The writer seems satisfied to put it on the ground that the railroad has a right to a reasonable enjoyment of its own property and its business calls it to the center of cities. If that be true is that any reason it should not pay for damages it should cause by acts which, if done by anyone else, would be held to be a nuisance? I leave the criticisms of this part of the case to the dissenting judge who, on page 706, says of the proposition thus laid down:

"This is a broad and sweeping proposition, and in view of the established facts in this case, I venture with great respect and deference, is as unsound as it is broad. If a private person can acquire and control property on one side of a street in

the heart of a city and so use it for an extraordinary purpose so as to permanently damage property on the opposite side of the street, to the extent of 30 or 40 per cent. of its market value, and not be liable, the maxim so to use your own property as not to injure another, has become obsolete and the law of nuisances must be modified accordingly."

Now as to the Georgia case of Austin *v.* Augusta Terminal R. Co. This case lays down as the law of Georgia the first two rules laid down by Mr. Lewis, and to which we have subscribed, and then proceeds to argue, that because this constitution requires the damages to be first paid that the damages therefor refer only to such damages as would accrue from the construction of the road and can then be ascertained, therefore has no application to damages which might accrue from subsequent operation of the road in the usual manner, it follows the English and Pennsylvania cases, which are based upon a provision allowing damages when caused by the construction of the public work. If there is any significance to be attached to the phrase to be first paid, the sufficient answer is that we have no such phrase in our constitution, and as to the impossibility of assessing damages caused by the subsequent operation of the road, they can be as well assessed for property where no part is actually taken, as to the residue of the tract, where a part is taken, and this latter is done every day by commissioners.

This case also cites the Fifth Baptist Church case and many other cases to show that the ordinary and usual operation of a railroad is not a nuisance. In these cases the railroads were chartered railroads, and had legislative sanction and, as has been held over and over again, were not actionable nuisances. It also cites the leading English case of Hammersmith R. Co. *v.* Brand, heretofore referred to, and the English cases following it, as authority to the effect that there can be no recovery for noise, smoke and cinders caused by the usual operation of a railroad, but the learned judge does not call attention to the fact that this case was decided construing an act of Parliament which only allowed damages caused by the construction, and as is said by the Texas Court in Railroad Co. *v.* Hall; supra; that the reasoning of the court in that case would have led to a different decision if the words injuriously affected had not been limited by the succeeding words, "by the construction of."

Then this decision assumes a false premise, viz: That an unchartered railroad must be a nuisance per se, in order that a landowner could recover for damages resulting from its usual and ordinary operation, and then proceeds to knock out this straw man by showing that an unchartered railroad is not a nuisance per se. But the position that I find the most fault with is that a nuisance may be created by smoke, noise, cinders

and vapors, etc., to such an extent that would cause a man to flee from his home as Lot did from Sodom, and make the building absolutely unfit for human habitation; that such injury would be injury only to the person and not to the property. This is in conflict with the principle the court starts out with and to which all agree, that is, if the injury would be actionable but for legislative sanction, etc.

The contention that although before the construction and operation the property in question might have a market value of $10,000 and afterwards and by reason thereof, have a market value of only $1,000, that the property has not been injured, entirely ignores the distinction drawn in the Rigney case between *res* or subject of property and property itself. That is to say, if the lot and buildings of appellant are to be regarded as property and not merely the subject of property, as strictly speaking they are, then there has been clearly no physical injury to it, but if by property is meant the right of use, enjoyment and disposition of the lot and buildings, then there has been a direct physical interference with appellant's property. For further just criticisms of this case, see dissenting opinion of Justice Lewis, concurred in by Justice Lumpkins.

Before proceeding to cite authorities which hold an unchartered railroad may be a nuisance, and for which a recovery may be had by a property owner whose property is damaged by the operations of the road, it would be well to call attention to the fact that so strong is the justice of allowing damages for such injury that several courts have given the relief by an elastic construction of the word "taken," where same occurs in this connection in their constitution. Before the adoption of the present Illinois constitution in case of Stone *v.* F. P. & N. R. Co., it was held, that a declaration, charging the defendants with casting smoke and cinders from its engines and locomotives in operating its road, upon the plaintiff's premises, was a good declaration. The court said: "The railroad company must be held responsible to property owners upon the street for such direct physical damage as shall result from the construction or operation of its road after same has been completed." See also, Minn., Adams *v.* Railroad Co., 12 Am. St. Reports 644.

Now we will briefly examine what the text writers and other courts say about the right to recover for smoke, cinders, etc., and as to whether or not under constitutions containing the same provisions as ours there can be a recovery for these things. The learned annotator of American Statute Reports, discussing the right to have damages for matters of smoke, noise, etc., on page 309 of 85 Am. St. Rep. says: "In determining the amount of damages which a person has sustained by reason of the location of a railroad across or *near* his premises, it is proper

for the jury to take into consideration the close proximity of the railroad to the premises and the injury and annoyance by noise and jarring caused by trains upon the track, and smoke and cinders or noisome vapors from engines, as elements of damage," citing many cases.

Dark *v.* Railroad Co., 148 Ill. 226, was a case like one at bar. The road was not on public street but on its own right of way, and plaintiff was damaged by smoke, cinders and ashes thrown on plaintiff's premises. Held, plaintiff could recover. This rule has never been departed from in Illinois, but has been followed in many cases down to and including the recent case of Calumet & C. Canal and Dock Co. *v.* Moranitz, 63 N. E. 165, in which last-named case the previous cases are cited approvingly. The case before referred to of Gainesville R. Co. *v.* Hall, 22 Am. St. Rep. 42, a well-considered case from Texas, where they have the same constitutional provision, holds, that a landowner whose property is injured by the construction of a railroad, and the vibration, smoke, noxious vapors and noise of passing trains, is entitled to damages, although such road is not upon his land nor any of his property taken in the construction, basing the decision on the ground that for an unchartered railroad to injure a man's property in this manner would be a nuisance.

In case of Vaughn *v.* Taff Valley R. Co., 5th H. & N. 679, Crompton, Judge, said: "Rex *v.* Pease decides this matter for it shows, that the use of a locomotive engine must have been accounted a nuisance, unless authorized by the Legislature, etc."

The New Jersey case before referred to in 13th Atlantic Reporter, refers to the English case, where an unchartered railroad company was held liable for the burning of a haystack, and that without regard to whether it had been negligent or not, the decision could have been based on no other ground than of nuisance. It was also held, in Jones *v.* Railway, L. R. 3d, Q. B. 733 that where the railroad was chartered, it was not liable for sparks escaping from its engines when due care was used, and under same circumstances was liable if railroad was unchartered.

Elliott on Railroads, § 1, says: "When a private person operates a railroad without legislative authority, it will be at the risk of being held for maintaining a nuisance or for injuries caused by operation of the road," and I have seen Wood on Railways, § 2, cited to same effect, but have not had access to the book.

It has been held, that vibration caused by the unauthorized operation of a railway is a nuisance, but that the vibration caused by the lawful operation of a railway is not. 21 Am. &

Eng. Ency. of Law, 698, 2d Ed., citing for the first proposition Porterfield *v.* Bond, 38 Fed. Rep. 391.

Again in 19 Am. & Eng. Ency. of Law 783, it is said: "Thus a private person may construct and operate a railroad on his own land or on land of another where he has obtained a right of way by purchase or reservation, but he becomes liable for all nuisances arising from the operation of the road," citing many English and American cases.

But why multiply authorities? Let us illustrate a little. Suppose Mr. Rockefeller with his many millions should purchase a right of way, without legislative authority, and build and operate a trunk line railway, over which ran a hundred or two trains a day. That this road ran in fifteen feet of a church, and every few minutes there passed a long train with its ponderous engines, with its low smoke stacks, and smoke, ashes and cinders, flying under forced draft, and with a noise so the human voice could not be heard, so that you could not open the windows of the church even in hot weather, and if the windows were opened the congregation would be deluged in smoke, ashes, dust and cinders, and the noise and vibrations so great that the religious services could not be held. Suppose instead of it being a church it was a dwelling house, or suppose it ran along on the edge of a highway of a thickly settled country, deluging the travellers in smoke, dust and cinders and scaring their horses to death. Would any one contend that such acts did not come easily within the purview of any legal definition ever given to nuisances?

The foregoing views lead me to the opinion that where the smoke, noise, cinders, ashes, dust and vibration from a chartered railroad company materially "annoys and disturbs one in the possession of his property, rendering its use or occupation physically uncomfortable to him," that such damage may be recovered under the provisions of our constitution, for the reason that if these acts were committed by an unchartered railroad company they would amount to an actionable nuisance.

There is another feature I will discuss briefly. Of course the Legislature has the power to even give larger rights of recovery than is given by the constitution. The third line of discussions laid down by Mr. Lewis is to the effect, that the word damaged covered any loss which may properly be taken into consideration in estimating damages to the balance of the tract, when part is taken. It looks very much as if the Legislature in framing its Eminent Domain acts adopted this view. The oath of the commissioners, § 1105-F, subsection 7, says: "And award damages, if any, resulting to the adjacent and any other property of said owner or tenant, and to the property of any other person as results from the construction and operation of the company's work." The report of the commissioners,

subsection 8, says: "After being duly sworn upon a view of the part aforesaid, and of the adjacent and other property of other persons who will be damaged by the works of said company, etc."

It will be observed that this legislative action sets to rest any proposition that damages can only be had for the construction, for the act expressly provides for any damages that may arise from the operation, as well as construction, and the Pennsylvania and Georgia cases are fully met on this point by this legislative act; also, observe the relation the word damages bears to the properties referred to. The single word damages at one point both in the oath and report, refers not only to the residue of the land taken, and adjacent to the land taken, but to any other property of the owner, whether adjacent or not, and to the property of any other person. Did the Legislature mean one thing by the single word damages, when applied to the residue of the land, a part of which had been taken, and another when applied to the other property of said owner or any other person. The Supreme Court of Appeals of this state seems to have adopted this view in the recent case of Swift & Co. *v.* City of Newport News, 52 S. E. 821, for after holding that true measure of damages is the difference between the market value before and after where property is not taken but damaged, the court, on page 821, says: "It may be said in all cases in which recovery was sought for damages where no part of the property is taken, but merely damaged by a public improvement, is entirely in harmony where it was held that the damage to the residue of the tract was an amount equal to the difference between the market value of the residue at the time of the taking, and its market value after the same had been so taken." Now if the measure of damages to the residue of the land where a part has been taken is the difference in the market value of the residue before and after, and the measure of damages to a tract no part of which has been taken, is the same, then it follows as day follows night that every element which entered into and depreciated the market value of the residue of a tract, would be considered in arriving at the depreciated market value of a tract no part of which was taken, and we know that the elements of damage referred to in commissioners' report on Mrs. Shartzer's land, are proper elements to be considered if a part of her land had been taken."

It seems to me the rule to be deduced from the case of Swift *v.* Newport News, may be stated as follows: There is no difference in the elements of damage to be considered, when property is damaged and no part taken, and damage to residue where a part is taken. The only difference being that in considering

benefits to set off damage, in the first instance you consider both general and peculiar benefits and in the latter, only such benefits as are peculiar to the property in question. It might be well, however, to observe that this case of Swift *v.* Newport News arose before the Eminent Domain Acts were enacted and was decided on the constitutional provision alone, and it would seem that the eminent domain act has to some extent changed the rule that I have deduced from this case, so far as it allows general benefits to be set off against damages, for the Eminent Domain Act both the oath of the commissioner and their report confines the benefits to be set-off "to peculiar benefits."

So whichever view is correct, the first, second, or third, of the line of decisions referred to by Mr. Lewis, Mrs. Shartzer is entitled to have the commissioners consider the questions of smoke, noise, dust, cinders, ashes, vibrations and on the question of the difference between the market price before and after. But it is said if this view should prevail where will it end if Mrs. Shartzer can recover, one a little farther off may recover, and a little farther only less, and suits will be innumerable. This is not correct. It was said in the case of Swift & Co. *v.* Newport News that the gist of the action for damaging property for a public use is a recovery of substantial damages and not to recover for an invasion of a legal right; consequently, nominal damages as such are not recoverable; such is the law of nuisance. The damages must be substantial, and if the damages be substantial, why should they not be recoverable? The courts of last resort from the states which hold that damages may be recovered on account of smoke, cinders, etc., arising from the operation of a railroad, do not contain many cases of this character, and the railroads seem to thrive in those states as well as anywhere else, and to the suggestion that the railroads would be greatly inconvenienced and harassed, I can but make the reply made by our Court of Appeals in the case of Townsend *v.* Norfolk R. & Light Co., 52 S. E. 970: "Courts have no policies and cannot permit consequences to influence their judgments." And as was said by Mr. Justice Harlan, when the same argument was made in case of Chicago *v.* Taylor: "We dismiss these several suggestions with the single observation that they can be more properly addressed to the people of Virginia in support of a proposition to change this constitution."

Since writing foregoing opinion I have seen a reference in *Case and Comment*, January number, 1907, to a recent Mississippi case, which seems to be in harmony with this opinion, but have not had access to the case. King *v.* Railway & Light Co., 42 So. Rep. 204.

The action of the commissioner in allowing Mrs. Shartzer

damages to her property on account of smoke, ashes, dust, cinders, noise and vibration, which will be the natural result of the ordinary and proper operation of plaintiff's railroad, will be affirmed.

Note.

See extensive note to Townsend *v.* Norfolk Ry. & Light Co., 12 Va. Law Reg. 200.

SUPREME COURT OF APPEALS OF VIRGINIA.

COMMONWEALTH *ex rel.* ATTORNEY GENERAL *v.* ATLANTIC COAST LINE R. CO.

Nov. 22, 1906.

[55 S. E. 572.]

1. Constitutional Law—Constitutional Questions—Determination—Corporation Commission—Jurisdiction.—The State Corporation Commission, Organized under Const. § 156 (c) [Va. Code 1904, p cclii], providing that in all matters pertaining to the public visitation, regulation, or control of corporations, within the jurisdiction of the commission, it shall have the powers and authority of a court of record, etc., has jurisdiction in a proceeding before it, by the state, to compel a carrier to issue mileage books at a reduced rate, as required by Act March 15, 1906 (Acts 1906, p. 541, c. 256), to pass on an issue raised as to the constitutionality of such act.

2. Same—Carriers—Regulation of Rates—Due Process of Law.—Act March 15, 1906 (Acts 1906, p. 451, c. 256), requiring all railroads operating in the state to keep on sale at all times mileage books of 500 miles and over to be sold at not more than 2 cents a mile, and good for the use of any dependent household member of the family of the party to whom it is issued, dwelling under the same roof, within one year from the date of the same, was unconstitutional, as depriving railroad companies of their property without due process of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 832, 847.]

3. Courts—Federal Courts—Rules of Decision.—A decision of the United States Supreme Court holding a state statute regulating railroads unconstitutional, as a deprivation of property without due process of law, is conclusive on the courts of another state in determining the validity of a similar statute of that state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 329-334.]

Appeal from State Corporation Commission.